

*Eller v. ROP*, 10 ROP 122 (2003)  
**JOSE ELLER,**  
**Appellant,**

v.

**REPUBLIC OF PALAU,**  
**Appellee.**

CRIMINAL APPEAL NO. 02-04  
Criminal Case No. 00-395

Supreme Court, Appellate Division  
Republic of Palau

Argued: July 16, 2003  
Decided: August 26, 2003

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Counsel for Appellant: Meredith Allen

Counsel for Appellee: Scott Banker

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; LARRY W. MILLER, Associate Justice;  
R. BARRIE MICHELSEN, Associate Justice.

Appeal from the Supreme Court, Trial Division, the Honorable KATHLEEN M. SALII,  
Associate Justice, presiding.

MICHELSEN, Justice:

Jose Eller<sup>1</sup> pled guilty to a charge of trafficking in methamphetamine and was sentenced to 25 years' imprisonment and fined \$50,000. The sentence conforms to the minimum mandatory sentence for such offense.<sup>2</sup> He appeals the sentence, arguing that the court erred when it denied him a sentence reduction for his cooperation with law enforcement.<sup>3</sup> He also maintains that a mandatory sentence of imprisonment for 25 years is in violation of Article IV, Section 10 of the Constitution, which prohibits torture or cruel, inhumane, or degrading treatment or punishment. Because we believe the Trial Division did not abuse its discretion by denying Eller a sentence reduction on this record, and that the sentence parameters set by the

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<sup>1</sup>The Appellant's full name is Jose Eler Pael Daguinot. Apparently he has been using the name "Jose Eller" in Palau.

<sup>2</sup>Any person who, *inter alia*, trafficks in methamphetamine "shall be sentenced to a term of imprisonment of not less than 25 years but not more than 50 years, and a fine of not less than \$50,000 but not more than \$1,000,000." 34 PNC § 3301(d). Persons sentenced to 25 years' imprisonment are eligible for parole after serving one-third of this sentence. 18 PNC § 1209.

<sup>3</sup>"The Court may impose a sentence or penalty less severe than the minimum punishment set out in this chapter upon any person who, after committing a violation of this chapter, willingly cooperates with law enforcement officers in their investigation of violations of this chapter." 34 PNC § 3310.

legislature for this offense do not violate the Constitution, we affirm.

## **BACKGROUND**

Eller and co-defendant Crisencio Cinco <sup>4</sup> were charged with three counts of importing, possessing, and possessing with intent to deliver or dispense methamphetamine in violation of 34 PNC § 3301. The affidavit of probable cause attached to the Information summarized the facts as follows:

On December 2, 2000, a customs officer at the Palau International Airport discovered 9.9 grams of methamphetamine in a package of incoming letters from the Philippines that were to be delivered to High Profile Speed Remittance. The methamphetamine was in a thick brown envelope addressed from Henry Guables, Makati City, Philippines, to Myrna Guables of 1124 Koror. Below the address was written, "Pls do not fold, pictures inside." Robert Claronino, an employee of High Profile Speed Remittance who was at the airport to pick up the letters, was informed of the package's contents and agreed to inform the Narcotics Office should anyone ask about it.

On December 4, 2000, Mr. Claronino called Narcotics Officer Julio Ringang and stated that Crisencio Cinco had asked about the package and planned on picking it up later that day. Officer Ringang and another officer delivered the package to Mr. Claronino, and then positioned themselves outside his office. Cinco subsequently arrived. When he left with the package, the officers arrested him. Cinco thereafter agreed to cooperate with the police.

He stated that he met Eller the previous month. Eller had told Cinco he was going to the Philippines and would send something back to Palau using the name "Myrna Guables." On December 3, 2003, Eller told Cinco to go pick up the package at High Profile. After his arrest, Cinco made a call from the police station to a person named Burton and told him the "stuff" was here. Burton called Eller to the phone, and Eller asked Cinco if he had the "stuff." Eller then told Cinco to come to his office at Lands and Surveys. Upon Cinco's arrival, Eller told him to come back at 4:30 p.m. Cinco returned to Lands and Surveys at the appointed time, trailed by the narcotics officers. When Cinco arrived, Eller got into his car and asked for the package. Eller opened it, examined the methamphetamine, then put it back in the envelope and placed it on the console between the seats. The officers stopped Cinco and Eller shortly thereafter, searched the car, and retrieved the package with the methamphetamine. Eller was arrested and charged with the offenses previously noted.

Plea negotiations were successful. In exchange for a dismissal of one count of trafficking and one count of possessing methamphetamine, Eller agreed to plead guilty to one count of importing in methamphetamine in violation of 34 PNC § 3301(d), to cooperate with law enforcement officers in further investigations of drug offenses, and to provide truthful information concerning his knowledge of substance trafficking in the Republic. The Republic agreed to provide the court with a statement detailing the extent of Eller's cooperation so that the

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<sup>4</sup>The charges against Cinco were ultimately dismissed by the government. The reasons for the dismissal are not part of this record.

court could consider a reduction in sentence pursuant to 34 PNC § 3310. Otherwise, the agreement provided for open sentencing.

At the change-of-plea hearing in September 2001, the court and the Defendant specifically discussed the sentencing possibilities.

Q: Do you realize that by leaving yourself to open sentencing, you realize that the minimum mandatory is twenty-five years for trafficking in methamphetamine?

A: Yes, ma'am.

Q: But according to the terms of the plea agreement, the Court may consider less than that depending on what happens between you and the government and when we come back in sixty days?

A: Yes, ma'am.

The court accepted Eller's guilty plea, set sentencing for a later date to allow him time 1125 to cooperate with law enforcement, and ordered a presentence investigation report.

In the presentence report, Eller denied any wrongdoing whatsoever. He explained that his late-November trip to the Philippines was a "short vacation" to visit his sick mother, and that he returned on December 2, 2000. Eller conceded that Cinco called him and told him that "a package" that he otherwise knew nothing about had arrived from the Philippines. Eller stated that during that call he asked Cinco to give him a ride home after work, which was his explanation for why he was in Cinco's car when the officers stopped the vehicle. He represented himself as a person who "married a coworker [Cynthia Turija-Daguinot] on August 16, 1999 in Court" and who "come[s] before [the court]" "as a family man, a father to a son, a husband to a wife that you may find mercy on me."

At the sentencing hearing held July 26, 2002, he returned to that theme, testifying that

I did my best to, to go over what I have promised to attorney Carrara but as a family man I have to take care my [sic] family in the Philippines so I was into [sic] two positions but I did my best to go on and look for the others who are still outside and doing illegal things.

There was some debate between counsel as to the extent of Eller's cooperation. Defense counsel argued that Eller had made a "good faith" effort to cooperate. The government, countering that attempts to have him set up drug transactions with potential suspects had not "panned out," argued that there was "basically no cooperation." As indicated by its own questioning, however, the court's concern was not with the question of Eller's cooperation, but with his subsequent denials of any criminal culpability, which were at complete odds with his plea of guilty in this case. In addition to that about-face, there were further questions concerning his candor and credibility. After having painted a picture of himself in the presentence report as a "family man"

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and a “husband to a wife” in the Philippines, Eller thereafter married one Flora Averion, who was locally employed, just days before the sentencing. As part of that marriage application he submitted an affidavit stating that he had never been married.

The court questioned him regarding his guilty plea in light of his new protestations of innocence.

Q: Mr. Eller, when we were here and you pleaded guilty, was that by your own choice?

A: Yes, Your Honor.

Q: Pleading guilty to trafficking in ice?

A: Yes, Your Honor.

Q: And you were involved in those, receiving a package with 9.9 grams of ice in December of 2000?

A: I, I did not, uh, I did not receive any package, Your Honor.

Q: You did not receive any package?

A: Yes.

Q: Okay. And that’s part of **1126** the Court’s dilemma is there’s a conflict in the affidavit of probable cause and your, your statement in the pre-sentence investigation report . . .

After a discussion of the status of co-defendant Cinco’s case, the court returned to the question of acceptance of responsibility.

Q: Mr. Eller is there anything you want, is there anything specific you want this Court to know before it hands out its sentence?

A: Yes.

Q: Or are you standing by your statement in the presentence investigation report?

Mr. Hollman: (Indiscernible)

A: Yeah. Uh, I wish to address the Court that I did not mail any package nor receive any package.

Q: You did not?

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A: Uh, I went to, I went to the Philippines but I did not mail any package.

Defense counsel asked some follow-up questions, then the Court resumed the questioning.

Q: And were you aware of what was inside the package?

A: I'm sorry?

Q: Did you know what was in the package?

A: No.

Q: Never, you never saw what was in the package?

A: Yeah. I just know it when [sic] Attorney Carrara, uh, show it to me in his office?

Defense counsel further questioned Eller, and the answers prompted the Court to ask:

Q: So you're pleading guilty to something you did not do? Is that what you're telling the Court? Yes? I need to hear you.

A: Yes.

Mr. Carrara then pursued this line of questioning for the government.

Q: And didn't you tell me you mailed this from PI to the Republic of Palau?

A: Uh, no. I told you that I, it was Mr. [Cinco's] arrangement. That's all I told you.

Q: But you were the one who mailed it, weren't you?

A: No, no.

Q: You don't recall telling me that?

A: No, I, I told you that I just **L127** carried the money but never mailed any package.

Defense counsel said that "this is an unanticipated wrinkle in this case" but he did not request that the Court allow the guilty plea to be withdrawn.<sup>5</sup>

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<sup>5</sup>Defense counsel asked the Defendant on the record:

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After further comments by both counsel, the Court continued:

Q: [T]his defendant understood at that time he was pleading guilty to a minimum mandatory twenty-five year charge and I haven't seen a reason to vacate that plea. You're sitting there saying that you did not commit it but you're not, you do not want to go to trial.

A: Yes.

After argument from counsel on the question whether "good faith" efforts to cooperate sufficed under the statute, the Court said the following:

What the court has heard today, the court is ready to rule, uh, the court believes Mr. Eller, he did try to the best of his ability. Without making a formal ruling good faith applies, the court has no reason to disbelieve Mr. Eller. Why wouldn't he try? It's a twenty-five year minimum mandatory.

The Court then returned to its questioning, again focused on the Defendant's refusal to accept responsibility and his credibility.

Q: You've maintained your innocence despite appearing before this Court and pleading guilty and that was what the Court was having problems with. You come in here voluntarily, you enter a plea and then you question all that when you are being interviewed by the Probation Office and here on the stand today. The Court just notes that as one of the factors it was, that was taken into consideration in considering this minimum mandatory crime and this was not a small amount of ice that was involved in this case. And according to the affidavit of probable cause it's 9.9 grams. And the Court's read your statement in the pre-sentence investigation report and you're working, you're, and this is a question the Court had and it goes more to credibility of the Defendant. The PSI indicates you're, married in the Philippines, is that correct?

A: Uh . . .

**⌋128** Q: I need a yes or no.

A: Not legally married (indiscernible)

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Q: Do you want me to move to withdraw your guilty plea and set up a trial date, is that what you're telling me?

A: Uh, no. It's . . .

Q: I mean . . .

A: No.

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Mr. Hollman: In common law, Your Honor.

Q: The PSI report indicates Court marriage in the Philippines and we have marriage certificate for a marriage in Palau's Courts two days ago, is that correct?

A: Yes.

Q: In the marriage certificate you state you've never been married before, that's correct?

A: Yes. I'm not married, legally married in the Philippines.

The Court concluded:

And at the same time, you're telling the Probation Officer and the Court that you're legally married in the Philippines, uh, in 1999, I believe. These are things the Court was taking into consideration in reviewing the, in determining the sentence and it goes back to the Defendant showing some kind of remorse, accepting guilt, uh, trying to give this Court reason to give something less than the minimum mandatory in this case. The Court has not found any reason to and Mr. Eller you're sentenced to twenty-five years and a fifty thousand dollar fine.

## **DISCUSSION**

### **A. Sentence Reduction Based Upon Cooperation**

Eller's first claim is that the trial court erred in refusing to reduce his sentence on the basis of his cooperation.

#### **1. Standard on Appeal**

We first consider the appropriate standard of review. The government suggests that the sentencing court's authority found in 34 PNC § 3310 to impose sentences below the otherwise mandatory minimum is a matter of discretion, and the standard on appeal is whether the trial court abused its discretion. We agree. The language of that section provides that the court "may" sentence a defendant below the statutory minimum if it finds that the defendant willingly cooperated. In the usual context, the word "may" connotes discretion. An example is *Arbedul v. Mokoll*, 4 ROP Intrm. 189, 194 (1994), where it was held that the use of the word "may" in ROP R. Evi. 201 "means that the taking of judicial notice is addressed to the discretion of the trial court." Similarly, in *Irruul v. Gerbing*, 8 ROP Intrm. 153, 154 (2000), we noted that a trial court decision pursuant to ROP R. Civ. P. 60(b), which provides that the court "may" grant relief from a judgment, is reviewed using the abuse-of-discretion standard.

An abuse of discretion occurs when a relevant factor that should have been given significant weight is not considered, when an irrelevant or improper factor is

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considered and given **1129** significant weight, or when all proper and no improper factors are considered, but the court in weighing those factors commits a clear error of judgment.

*United States v. Kramer*, 827 F.2d 1174, 1179 (8th Cir. 1987).

## **2. Cooperation With Law Enforcement as a Sentencing Factor**

Eller contends that “the issue is whether [he] willingly [cooperated] with police in their investigations of drug law violations.” He argues that the trial court failed to make any ruling in that regard, and that it impermissibly considered other factors that had nothing to do with cooperation. As we read the record, however, the trial court did make a finding of cooperation that Eller “did try to the best of his ability” but concluded, based on other factors, that a reduction of his sentence was not warranted. We see no error in the trial court’s reasoning or in the sentence it imposed.

Even where a finding of cooperation is made, cooperation is not the only sentencing factor. Acceptance of responsibility is always an appropriate consideration for the sentencing judge, and is an independent component of the sentencing determination. The defendant who has shown genuine remorse and accepts responsibility has taken important steps toward rehabilitation. “A defendant does not accept responsibility when he denies committing criminal actions and relevant conduct which the [sentencing] court attributes to him.” *United States v. Sierra*, 188 F.3d 798, 804 (7th Cir. 1999). Here, Eller was not candid with the court. Faced with strong evidence of guilt, he pled guilty, yet at sentencing he reverted to denying any wrongdoing. Furthermore, he tried to engender sympathy from the court by referring to himself as a “family man” and “a husband to a wife,” who has to take care of his family in the Philippines, but when confronted with his recent marriage in Palau, and the fact that he filed an affidavit asserting he had never been married, his explanation was that technically he was not “legally married” in the Philippines. We find no abuse of discretion in a case where the sentencing court declines to depart from a mandatory minimum sentence, even if the court finds that the defendant cooperated, when the Defendant refuses to accept responsibility for his actions and is not candid with the Court. We therefore affirm the court’s refusal to grant Eller a sentence reduction under 34 PNC § 3310.

### **B. Article IV, Section 10, Palau Constitution: Prohibition Against Cruel, Inhumane, or Degrading Treatment or Punishment**

Counsel for Defendant also argues that the mandatory minimum sentence imposed here is unconstitutional. Starting from the premise that Article IV, Section 10 of the Constitution (hereinafter, “Section 10”) is “comparable” to the Eighth Amendment of the United States Constitution, counsel’s brief reviews the on-going debate in the United States over whether the Eighth Amendment’s “Cruel and Unusual Punishment” Clause allows courts to strike down mandatory sentences if such sentences are not, in the court’s view, proportional to the crime. Concluding that the advocates of the “proportionality” rule have the better argument, counsel

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suggests that this Court ¶130 should adopt that approach here. <sup>6</sup> However, because the Constitution does not contain the expression “cruel and unusual punishment” we need not join the debate over the meaning of that phrase, but rather turn to the specific language used.

Section 10 prohibits “torture, cruel, inhumane or degrading treatment or punishment.” This language appears derived from, but is not identical to, the Universal Declaration of Human Rights. *See Kazuo v. ROP*, 1 ROP Intrm. 154, 162 (1984). <sup>7</sup> We note that Section 10 is a limitation on both treatment *and* punishment. Not all torture, or cruel, inhumane, or degrading treatment, is inflicted as punishment. It may occur because of a variety of reasons, ranging from antipathy to indifference. Regardless of the cause, the government is prohibited from engaging in such conduct.

Here, Eller is not objecting to the treatment he is receiving, but rather to the length of his sentence. This appeal is therefore a “punishment” case rather than a “treatment” case. A prison term is inarguably a “punishment” because it is “a penalty inflicted for an offense or fault.” *Random House Webster’s College Dictionary* 1094 (1996). <sup>8</sup> Consequently, the Palau Constitution prohibits a sentence of a term of years as punishment, if the term can be characterized as “cruel, inhumane, or degrading.” An example of such a sentence might be Justice Stewart’s hypothetical law imposing a mandatory life sentence for an overtime parking ticket. *See Rummel v. Estelle*, 100 S. Ct. 1133, 1146 (1980) (Stewart, J., concurring). Nonetheless, absent circumstances that compel the conclusion that a particular sentence is properly characterized as cruel, inhumane, or degrading, “it would be inappropriate for this Court to second guess the Legislature as to whether a given sentence is excessive in relation to the crime.” *ROP v. Ngiraboi*, 2 ROP Intrm. 257, 267 (1991); *accord Gotina v. ROP*, 8 ROP Intrm. 56, 59-60 (1999) (“It is for the legislature, and not the courts, to prescribe the types and limits of punishments for particular crimes, and the courts must defer to legislative judgments in that regard.”).

Turning to the case at hand, the Trial Division sentenced Eller to the minimum ¶131 sentence: 25 years’ imprisonment and a \$50,000 fine. He is eligible for parole after serving one-

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<sup>6</sup>Whether there is a proportionality principle embodied in the Eighth Amendment, and if so, what are its parameters, continues to generate discussion. Currently, Chief Justice Rehnquist, Justice O’Connor, and Justice Kennedy are of the opinion that judicial review of legislatively-mandated sentences is very circumscribed. *See Ewing v. California*, 123 S. Ct. 1179, 1185-1190 (2003). Justices Scalia and Thomas believe that the Eighth Amendment concerns only the modes of punishment and is not a check on the legislature’s determination of the length of sentence. *See id.* at 1190-91. Justices Stevens, Souter, Ginsburg, and Breyer disagree, believing that a broad proportionality review is required by the Eighth Amendment. *See id.* at 1191-1202.

<sup>7</sup>It was also in *Kazuo* that this Court construed and applied the “cruel and unusual punishment” clause, as codified at 1 TTC § 6, because the Trust Territory Bill of Rights still applied in the period before the Trusteeship was terminated. Palau Const. art. XV, §§ 3, 10. The *Kazuo* Court’s interpretation and application of 1 TTC § 6 is not pertinent to the issue in this case, which concerns the meaning of Article IV, Section 10, of the Palau Constitution.

<sup>8</sup>When construing constitutional language, general and legal dictionaries are appropriate references. *Tellames v. Cong. Reapportionment Comm’n*, 8 ROP Intrm. 142, 143 (2000).

third of that sentence.<sup>9</sup>

When considering the legislation that became 34 PNC § 3301, the House of Delegates Committee on Judiciary and Governmental Affairs observed:

Your Committee held a public hearing on April 10, 1997. Comments were provided by law enforcement officers, drug rehabilitation specialists, Ministry of Justice officials, and several members of the public. The concept of increased penalties for drug offenders received the overwhelming support of those in attendance.

Stand. Com. Rep. 5-14 (1997). The Committee stated that “it is important to be tough on persons who attempt to import drugs into the Republic” and that increased penalties should have a “strong deterrent effect.” *Id.* The Senate Committee on Health, to whom the proposed bill was referred, stated that “this bill, as amended, sends a clear and unmistakable message to the peddlers of these drugs: Stop your destructive, predatory conduct or we will send you to prison for a long, long time.” S. Supp. Stand. Com. Rep. No. 5-26 (1997). The conference committee noted: “These stiff penalties are designed with the purpose of eliminating the supply of these dangerous substances in our country.” Conf. Com. Rep. No. 2 (1997).

The legislature identified drug trafficking as a major concern. The decision to emphasize deterrence by requiring lengthy mandatory minimum prison sentences for those convicted of drug trafficking was a policy judgment, and such policy judgments are at the core of the legislative function. *See Gotina*, 8 ROP Intrm. at 59-60. Here, the resulting sentencing scheme, while harsh, is not one that can be called “cruel, inhumane, or degrading” by any reasonable standard.<sup>10</sup>

## CONCLUSION

The Trial Division did not abuse its discretion in refusing to reduce Eller’s sentence below the mandatory minimum. A 25-year sentence for importing methamphetamine with the possibility of parole is not a “cruel, inhumane, or degrading” punishment under Article IV, Section 10.

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<sup>9</sup>The availability of parole is an appropriate consideration when assessing the severity of a sentence. *Harmelin v. Michigan*, 111 S. Ct. 2680, 2705 (1991), *Solem v. Helm*, 103 S.Ct. 3001, 3013 (1983); *Rummel*, 100 S. Ct. at 1142 (1980); *see also Ewing*, 123 S. Ct. at 1194-95 (Breyer, J., dissenting).

<sup>10</sup>At the very end of his opening brief, Appellant also asserted that “the \$50,000 [fine for importing methamphetamine] is excessive.” The assertion is not developed, no case law or argument is ever presented, and the assertion never appears again. We deem this issue waived.